any benefit by its prosperity beyond payment of their debt. Turnbull still held the whole stock-in-trade, and managed the concern exclusively and by himself.

It is said that this debt was discharged, and so it was; but it was open to the debtor, who was a free man, to revive it, and he did revive it as part of the consideration on which Crombie agreed to guarantee his composition to his other creditors. It was not a gratuitous arrangement, whatever the effect of that may be. The consideration which Turnbull received was of the most substantial kind, for he obtained easy payment of his composition, and a sufficient advance to start him afresh in business. To obtain the advantages stipulated Crombie and Fender ran considerable risks, and contributed a large consideration. So solid, in fact, were the responsibilities undertaken by Crombie, that while he has not received a shilling out of the business to account of this old debt, he is left with a great part of the advances of the bank to provide for. No question has been raised on the record as to the legality of this arrangement under the bankrupt laws; and even if there could have been room for such a question, the effect of a successful challenge on that head would never have been to create a partnership with Turnbull, but simply to annul the claim of Crombie to draw payments from the profits of the business, or to compel him to account for what he drew. For my own part it has not been made intelligible to me on what ground any such plea could rest.

It is needless to go into the authorities, for I think the present case entirely outside the principles even of the old and discarded doctrine of participation of profits. The case of *Grant* v. *Eaglesham* was so far more favourable that the assignee there never could have drawn anything but his commission. But there the apparent ownership and the actual benefit obtained were much greater, for there was an actual transfer of the business in *Grant's* case, while there was nothing here but financial supervision. The present is neither a case in which the defenders have tried to obtain the profits of partners under the guise of creditors, nor one in which those who were truly creditors have deceived the public under the guise of partners. It is no longer alleged that they held themselves out as partners, and I am very clearly of opinion that they never were or thought of being so.

The only other element in the proof on which the pursuer founds are certain alleged admissions of partnership said to have been made by Crombie. On the proof these have been reduced to one occasion, which occurred four years after the arrangement was made. Mitchell, who had done business with the firm, and was examined as a witness, certainly says that Crombie told him that he was a partner with Turnbull, and that he was influenced by that statement in the settlement of his account against Turnbull. Crombie denies that he made any such statement. That Crombie stated that he was assisting Turnbull I do not doubt, and that Mitchell inferred from what he said that he was a partner is probable. But this is far too slender a ground for the inference deduced from it, even if it were sufficiently established.

In regard to this matter, I observ ethat while the pursuer states that he himself furnished goods to Turnbull on the understanding that the defenders were partners, he does not even appear as a witness to support the statement.

Lord Ormidale concurred.

Lord Gifford — I concur entirely. The moment the argument that the defenders held themselves out as partners fails, we have only to inquire whether a real partnership subsisted. But no such position has been established; and accordingly no liability has been incurred.

The Court pronounced the following interlocutor:—

"Find that the pursuer and respondent has failed to prove that the appellants were partners of John Turnbull & Company: Therefore sustain the appeal; recal the judgments complained of; and find the appellant entitled to expenses in both Courts," &c.

Counsel for Pursuer (Respondent)—Trayner—Darling. Agent—H. B. Dewar, S.S.C.

Counsel for Crombie (Defender and Appellant)—Mair—Rhind. Agent—W. Steele, S.S.C.

Counsel for Fender (Defender and Appellant)—Balfour—Mackintosh. Agents—Frasers, Stodart, & Mackenzie, W.S.

Saturday, July 20.

FIRST DIVISION.

MITCHELL & OTHERS *v.* BURNESS.

Judicial Factor—Law Agent—Fees—Judicial Factor not Entitled to Act as Agent for the Estate.

A judicial factor, who was partner of a legal firm, employed that firm to conduct his defence to an action raised for division of the funds under his charge. *Held* that the firm were not entitled to any business charges against the estate in the factor's hands beyond those of outlay.

This was the sequel of the case reported *ante*, June 19, 1878, p. 640, and came before the Court now upon the report of the Auditor, who desired the Court to say whether he was to allow Mr Burness, the judicial factor, whose legal firm, Messrs W. & J. Burness, W.S., had acted as his agents, to charge the expenses incurred by him in defending the action against the fund. The Auditor doubted the competency of doing so, on the authority of *Lord Gray & Others*, Nov. 12, 1856, 19 D. 1.

It was submitted for Mr Burness that on the authority of *Scott* v. *Handyside's Trustees*, March 30, 1868, 6 M. 753 (Lord Deas' opinion *ad fin.*) there was an exception in favour of the factor in the case of process business.

At advising—

Lord President—The Auditor has not disposed of the question whether Mr Burness as law agent is entitled to make certain charges against the trust-estate, but has reported that point to us.

The state of the facts is this—Mr Burness was judicial factor, and while holding that office the firm of which he was a partner acted for him in the judicial proceedings connected with the

estate under his management. The question is, Whether his firm is entitled to charge for their services in conducting these proceedings? I am sorry for the operation of the rule of law in this particular case, but the rule we must follow is that which was laid down in the class of cases which were all decided under the name of *Lord Gray*. We cannot go back upon that decision. The mere fact that Mr Burness had left that part of the country where the factory business was conducted and had devolved the management of it on another gentleman can make no difference.

I am therefore of opinion that we must remit to the Auditor to disallow all the charges except those by which Mr Burness has been out of pocket.

Lord Deas—I had some hope that the charges here would fall under an exception. We were referred to the case of *Scott* v *Handyside's Trustees*, in which I made a reference to the case of *Findlay's Trustees* and to Lord Colonsay's note in that case. The effect of that was said to be, that while a party in the position of judicial factor or trustee was excluded from making ordinary law charges against the estate under his charge, an exception was allowed in the case of process business. That question was not at issue in *Scott's* case. It was a very troublesome case to decide, as the whole papers required to be examined in order to see whether the party making objection to the charges was barred from doing so. What is said there about process business is merely incidental. It takes a very careful examination of *Lord Gray's* case in order to discover that process business was included in the accounts there. I have examined the accounts, and I see that process business was comprehended in several of them. It is impossible after the decision of the whole Court in that case to say there is any such exception, and accordingly I am of the same opinion as your Lordship.

Lord Mure—The principle of *Lord Gray's* case applies here. The rule laid down there and in the two English cases quoted in the Lord Justice-Clerk's opinion in that case must be applied to the case before us, although I must say I regret it in the circumstances of this case.

Lord Shand—I am, like all your Lordships, quite satisfied that in this case all the expenses charged by the firm to which Mr Burness belongs were necessarily and properly incurred; for Mr Burness, who was judicial factor on the estate, only did his duty in defending the fund against the claim that was made for its division. But at the same time the Court has no choice but to apply the broad rule that was laid down in the case referred to by your Lordships in the full consciousness that it might in some case press hardly. The principle of that rule is directly applicable, viz., that one holding the office of factor and occupying therefore a position of trust cannot receive any remuneration for his services as law agent.

The Court therefore remitted the account back to the Auditor to tax on the principle of allowing only costs out of pocket, and to report.

Counsel for Factor — Thorburn. Agents—W. & J. Burness, W.S.

HOUSE OF LORDS.

Thursday, March 21.

(Before the Lord Chancellor, Lord Hatherley, Lord O'Hagan, Lord Blackburn, and Lord Gordon.)

GARDNER *v.* BERESFORD'S TRUSTEES.

(*Ante* vol. xiv. 570, June 13, 1877, 4 R. 885; and vol. xv. 359, February 8, 1878.)

Writ—Statute 1696, *c.* 15—*Subscription by Initials.*

Held (*aff.* judgment of Court of Session) that a writing dated in 1873, which consisted of two separate sheets of paper and seven pages, and was subscribed on the last page by the granters and witnesses, but merely initialed on those before it, was an improbative instrument under the Act 1696, c. 15.

Writ—Conveyancing (*Scotland*) *Act* 1874 (37 *and* 38 *Vict. cap.* 94), *secs.* 38 *and* 39—*Retrospective Effect.*

Held (*aff.* judgment of Court of Session) that the provisions of the 38th and 39th sections of the Conveyancing (Scotland) Act 1874, the effect of which is to dispense with certain important solemnities which were previously required in the execution of written deeds, are not retrospective.

Opinion (*per* Lord Blackburn) that statutes introducing alterations in the law of evidence are, similarly with those which effect a change in forms of procedure, retrospective in their operations.

This was an action seeking to set up as a probative document an agreement for a lease, which consisted of two separate sheets of paper and seven pages, which was subscribed by the parties on the last page in proper form, but merely initialed on the prior pages. A formal lease, which had afterwards been executed, had been reduced on the ground of fraud, and decree of removing pronounced against Gardner, the present pursuer.

On February 8, 1878 (*ante* 359) the Court of Session had held that the document was invalid under the Act 1696, c. 15, and that it was not set up by the 38th and 39th sections of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), which were not retrospective in their operation; and had therefore assoilzied Beresford's trustees, the defenders.

The pursuer appealed to the House of Lords.

The respondents were not called upon.

At delivering judgment—

Lord Chancellor—My Lords, the only questions upon these two appeals which have been opened for your Lordships' consideration, and the only questions, as it is admitted at the bar, which your Lordships have to decide, are questions which at first sight appear to be of very considerable technicality, but are such that the reasoning which your Lordships must apply to them must be in consonance with the practice which has hitherto prevailed in Scotland, and with the decisions both of the Scotch Courts and of this House. My Lords, the two questions